

**ILPA response to the Further Consultation on the draft Short-Term Holding Facility (STHF) Rules**

1. ILPA is a professional association with around 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous Government and other stakeholder groups including the Detention Users Group.
2. In February 2006, ILPA responded to the consultation on the original draft of these Rules. That response remains available in the Submissions section of our website at [www.ilpa.org.uk](http://www.ilpa.org.uk)
3. This response is divided into two sections – General and The Rules. In the former, we offer some general observations upon the consultation, changes to the original draft Rules introduced in the current version, the UK Border Agency's response to our original comments and the implications for the change to meaning of "*short-term holding facility*" to be introduced by the Borders, Citizenship and Immigration Bill. In the latter, we make observations on discrete rules in the current draft Rules.

**General**

4. We are grateful for the opportunity to comment upon the revised draft. We are disappointed that draft Rules, upon which we offered comments in February 2006, have in the intervening three years progressed no further than the revised draft. However, we acknowledge and welcome those changes which address some of our original concerns, in particular:
  - The revision of the rule regarding visits so that it is not, on its face, limited to family visits.
  - The revision of the rule regarding correspondence so as to remove provision for the Secretary of State to direct that it is necessary for the detainee not to send or receive letters or facsimiles.
  - The express reference in the rule regarding correspondence that the Secretary of State may bear postage and facsimile costs.

- The inclusion of a rule to reflect, in part, Rule 35 of the Detention Centre Rules 2001.
5. We are grateful for the documents, Annex A and Annex B, provided for this consultation, which give some further explanation of some of the revision to the original draft and response to our original comments. This has been helpful to us in responding on this occasion.
  6. We note that the revised draft Rules, however, are far from finished. For instance, it appears that there have been significant revisions immediately prior to their being distributed for consultation. Chapter 7 of Part 1, in particular, appears to have undergone significant change, which has affected the numbering of the Rules. It has not been helpful that several of the references to particular rules have been rendered inaccurate. It has been particularly unhelpful that, not only has the numbering of the Rules changed, but the content of individual rules has evidently been lately revised. In some instances, where for example there are references to paragraphs, which do not exist, it has not been immediately clear what is the reference that is intended.
  7. We would also draw attention to the inclusion of a “?” in what is rule 54(4) of the revised draft. We are unable to comment on the suitability of whatever reference or definition it may be intended to insert here. There are also examples of where lists (e.g. the definitions list in rule 2) are out of order, when these ought to follow an alphabetical or numerical order.
  8. As regards the explanation for “*changes that feature in the revised draft STHF Rules*” (Annex A), we wish to draw attention to our dissatisfaction with the explanation provided at paragraph 2, which we reproduce in full below:

*“The previous Rule 3 (ie ‘Purpose of short-term holding facilities’) no longer features. The reason for change is necessary because in practice it is not itself a Rule but is instead an expression of principle. The Rules are not the appropriate vehicle for such expressions. While we appreciate that such a statement already exists within the Detention Centre Rules 2001 the language of Statutory Instruments are now required to be rather more tightly drawn and the legal advice we have received is that such matters are no longer considered appropriate for the Rules. The statement of principle will be expressed in the Explanatory Memorandum that travels with the Rules and will be underpinned in the operating standards and guidance that supports them.”*

9. It is not correct that statements of principle or purpose are not appropriate for inclusion in Rules or Statutory Instruments. Indeed, it is vital that such statements are contained either in the relevant

Rules or Statutory Instruments or in governing or primary legislation to which the relevant Rules or Statutory Instruments are subordinate. The reason for this is plain. The Rules should be drafted to meet a purpose. As such they must be subordinate to the purpose, and interpreted by reference to that purpose. To remove, as proposed in the explanation given, such statements to Explanatory Memoranda or operating standards and guidance is to deny the force or effectiveness of such statements by subordinating them to the very Rules they ought to govern. If this is the current thinking on the part of legal advisers, that thinking is in urgent need of correction – not merely in respect of these draft Rules, but generally in relation to the UK Border Agency’s current simplification project.

10. It may serve as a useful reminder of the significance of these observations in respect of the draft Rules, to recall the terms of the rule that has been removed:

*“3(1) The purpose of short-term holding facilities shall be to provide for the secure but humane accommodation of detained persons in a relaxed regime with as much freedom of movement and association as possible, consistent with the time detained and with maintaining a safe and secure environment... whilst respecting in particular the dignity and the right to individual expression...”*

11. We also note the Government’s intention that the Borders, Citizenship and Immigration Bill will, by what is now clause 25, amend the definition of a short-term holding facility in section 147 of the Immigration and Asylum Act 1999, so that the definition will be:

*“a place used for the detention of detained persons for a period of not more than seven days or for such other period as may be prescribed (whether or not it is also used for the detention of other persons for any period).”*

12. Clause 25 was introduced to the Bill at Committee stage, and so has not been addressed in any Explanatory Notes. It is clear from the Minister’s responses during the debates on this clause that the Government is far from clear as to what is the effect of the changes introduced by clause 25<sup>1</sup>. By removing the word “solely” from the current definition, the new definition would on its face include many places where persons are held for no more than seven days under immigration powers, but where many other persons are held whether for longer periods or under policing, sentencing or other powers. There is an urgent need for clarification of the meaning and effect of the proposed new definition, and the consequential applicability and effect of implementing the draft Rules.

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<sup>1</sup> see the Minister’s responses at *Hansard*, HL Committee 25 Feb 2009 : Columns 289-290 and HL Report 25 Mar 2009 : Columns 696-699

13. We note that the draft Explanatory Note states that:

*“Short-term holding facilities are places used mainly for the detention of immigration detainees for a period of not more than seven days...”*

14. However, the proposed statutory definition makes no reference to “*mainly*” whether expressly or by implication. In introducing the amendment, the Minister stated that it:

*“...will provide the [UK Border] agency and Her Majesty’s Revenue and Customs with the flexibility in the future to use short-term holding facilities to detain persons other than those who are detained under the administrative provisions of the immigration legislation.”<sup>2</sup>*

15. There appears to be no limitation on the types of detainees who could be held at an STHF; nor provision that an STHF would necessarily be used mainly for immigration detention. The proposed definition has the potential to include many more places within it than are currently defined as STHFs. We are concerned that the draft Rules we are now invited to offer comments upon may not be suitable because they will apply to places and to detainees for whom they are not designed. What may be adequate or appropriate in respect of a person detained under immigration powers with others held for similar periods and under the same powers, may not be adequate or appropriate where that person is detained with others who may be held for significantly longer periods or under different powers.
16. As regards “*UKBA’s comments on ILPA’s comments (forwarded by Elizabeth White) on the original draft Rules*” (Annex B), we wish to draw attention to the responses to our general suggestion, in relation to what were rules 6, 24 and 33, that the Rules provide for legal representatives to be notified in certain circumstances. The general response is that it is for the detainee to inform his or her representative, not for officials or staff. The response is inadequate.
17. We had proposed that the record maintained at each STHF should include details of any legal representative that the detainee has; and that the representative should be notified of the detainee’s detention at the particular STHF, of any interviews to be conducted with the detainee by the police, immigration officers or other Government officials and of any decision to confine the detainee in “*special accommodation*”. The reason for requiring notification of the representative of these matters is that these each relate to legal and human rights in respect of which the representative is responsible for protecting the detainee. Our proposal was not that the UK Border Agency or STHF staff should thereby become

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<sup>2</sup> Hansard, HL Committee 25 Feb 2009 : Column 287

responsible for ensuring that the detainee was legally represented, but that they should ensure that where a detainee had instructed a legal representative, officials respected the detainee's wish and right to the protection of his or her legal and human rights by such representation.

18. By abrogating the responsibility of notifying the representative to the detainee, the draft Rules fail to demonstrate adequate respect for the detainee's right to representation and the particular vulnerability of those who are detained. We recall the observations of Anne Owers, HM Chief Inspector of Prisons, to which we referred in our original response, and the wider observations we made under the heading "*General Observations*" in that response, including the reference to clear examples as to how detainees are inadequately protected by failure or refusal to give notice to their representatives. We note also the increased vulnerability of many immigration detainees by reason of language and cultural barriers, and lack of familiarity with legal systems or rights. The response to our original comments fails to address these concerns.
19. Moreover, we note that the suggestion that the responsibility for notifying representatives should be left to detainees ignores the fact that the detainee's liberty is by definition restricted and hence his or her ability or opportunity to notify a representative may be impeded. For instance, if a detainee is required to now attend an interview of which he or she has not had any or adequate notice, the opportunity to notify any representative is outside of the detainee's control – unless he or she is prepared to resist attendance or participation in the interview. The Rules should protect against such circumstances, and as currently drafted they do not. The clearest way in which such protection could be provided would be to require notification to legal representatives in the circumstances we originally proposed.
20. We also wish to draw attention to the response to our proposal that the Rules include that information be available to detainees about how to apply for bail, and that forms be available in order to make such applications. Similarly, temporary release and temporary admission should be addressed. The bare assertion that "*this is not a matter for the Rules*" is inadequate. While we acknowledge that a commitment is given that the "*planned operating standards*" will cover these issues, we maintain that the importance of the right to liberty and to be able to apply for liberty are so fundamental as to justify requiring in the Rules that such information and forms are made available to detainees. There should be a similar requirement that information be available to detainees as to the availability of legal representation and legal aid.
21. In order to reduce the risk of self-harm, the Rules should contain a specific duty to ensure that ligature points are removed to the

greatest extent possible, and for staff to have ready access to ligature cutters.

22. There should be a duty to have CCTV monitoring and recording in order to enhance the safety of everyone in an STHF.
23. There should be a specific duty for staff in STHF's to wear a badge clearly identifying them, whether by name or number. This would reduce the possibility that a detained person, who considers he or she has cause for complaint, is hindered in pursuing a complaint because of the difficulty in identifying a particular member of staff.
24. There should be specific provision made in respect of a detained person's release, particularly their onward travel to accommodation. Unless it is clear that the person can pay for this travel, reasonable facilities or financial support should be provided – e.g. a taxi, where an individual cannot be expected to find their way by bus; properly completed rail travel warrants. Similarly, where it is not clear that the person can provide for his or her immediate needs, financial support ought to be available. Generally, there should be a duty to be concerned for the person's wellbeing.
25. We welcome the commitment to provide us an opportunity to comment on a draft of the operating standards in due course.

### **The Rules**

#### ***Rule 5 (Holding rooms)***

26. We remain concerned that numerous rules are disapplied from holding rooms. The logic for this is in the main part to do with perceived limitations on space and the convenience of the detaining authorities rather than the interests of the detainees themselves. There is an assumption that detainees will be kept in holding rooms for short periods of time. However, a detainee may be detained for up to 18 hours, or up to 24 hours if authorised by the Secretary of State, in a holding room. This means that a person could spend 18 or 24 hours in a room without the right to retain their personal property, without any sleeping accommodation, without the right to receive sufficient clean clothing from outside, without any entitlement to be provided with toiletries or facilities for a shower or a bath or (for men) to shave, without the right to receive any incoming telephone calls.
27. It must be recalled that those held in a holding room may, both prior and after the period of detention in that place, be without opportunity for sleep, clean clothing, opportunity to wash or shave or to receive a telephone call for several hours – e.g. during a journey to the UK, to another place of detention or to accommodation in the UK.

28. We also see no reason why, for the purposes of identification and welfare, a personal record for each detained person should not be prepared and maintained. Police keep custody records for detainees regardless of how short the detention is and a similar approach should apply to immigration detention.
29. We are particularly concerned, given what will often be the imminence of removal, that the disapplication of the rule regarding correspondence and part of the rule regarding use of telephones will hinder communication between detainees and representatives, friends and family. As regards mobile telephones, there seems to be a working practice for mobiles to be retained by staff, if they have a camera. Since most current mobiles will have a camera, this amounts to a policy that mobiles generally will not be allowed. When they are allowed, they may or may not have a signal, depending on the location. There must, therefore, be ready access to a landline (but not merely a pay phone) that can accept incoming calls, and to facsimile facilities.
30. We are unable to provide comment on paragraph (5) since rule 27 (medical care) does not exist, and while we may speculate that a reference to rule 29 (general) may be intended, that rule does not contain 11 paragraphs; and hence it is particularly unclear what is intended to be excluded in relation to holding rooms.

***Rule 6 (Information to detained persons about these Rules and the short-term holding facility)***

31. Whereas the inclusion of “*in a language which the detained person understands*” is an improvement, this Rule should be further improved by revising paragraph (2)(b) so that the explanation is not merely provided where it “*appears*” an adult detainee is having difficulty understanding written information, but that some positive effort is required to check that the detainee can understand the written information.
32. We note that reports of HM Chief Inspector of Prisons have indicated that there is little use made of telephone interpreting facilities<sup>3</sup>; and this despite some detainees having little awareness of what is happening to them.

***Rule 8 (Detained persons’ property)***

33. This rule should be improved by ensuring that those who are detained unexpectedly are to be given an opportunity to recover property and money that is not with them, or to secure property that cannot accompany them to the STHF. For instance, if someone

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<sup>3</sup> e.g. see paragraphs 1.28 & 1.29 of the report on the unannounced full inspection at Edinburgh Airport on 20 February 2008, and paragraph 1.8 of the report on the unannounced full inspection at Harwich International Port on 3-4 June 2008

drives to a reporting centre in his or her own car and is then unexpectedly detained, provision should be made for the car to be secured in a safe place. People should be given an opportunity to return to their dwelling to pack belongings. People should also be able to withdraw money from cash points if their detention will be of any significant length. It is inadequate for the UK Border Agency to simply say that if there happens to be a friend available to do this, it will be facilitated. Specific provision should be made.

**Rule 11 (Reasons for detention and up-date of claim)**

34. The rule should make clear that the detained person may make a request for the purposes of paragraph (2) to a member of staff at the STHF.
35. We recall our reference (above) to telephoning interpreting facilities. To facilitate the right to be able to request an update, there needs to be specific provision so that, where it is clear that a detained person who cannot speak English wishes to communicate with STHF staff, a staff member shall use a telephone interpreting service. Moreover, this ought to have more general application in relation to other aspects of the Rules (e.g. in relation to healthcare, correspondence and requests or complaints).
36. The improvement made to the rule regarding information by including the words "*in a language which the detained person understands*" (see above), ought also to be reflected in this rule to ensure that reasons for detention and updates are also understood by detainees.

**Rule 16 (Food)**

37. We note that this rule has been substantially revised since the original draft. Annex A provides no explanation other than to suggest that the language of the rule "*has been tightened or the provisions have been broken down in order to make [it] clearer and so better to understand*". That explanation does not appear satisfactory. On its face, the rule as currently drafted removes several requirements or standards as to food and its preparation and service; and by removing that which included drink within the meaning of "*food*" to remove requirements or standards as to drink and its preparation and service. None of this appears to promote clarity or better understanding.

**Rule 17 (Hygiene)**

38. We note that this rule has been revised to remove reference to "*providing facilities*" for bathing or showering and for shaving. The explanation provided by Annex A does not address this.

### **Rule 23 (Correspondence)**

39. Although paragraph (2)(a) is generally in the same terms as appeared in the original draft Rules, we consider that it may be improved by making direct reference to others including the United Nations High Commissioner for Refugees, Members of Parliament, the Secretary of State and foreign embassies or consulates. We welcome the inclusion of "*the detained person's legal adviser*".
40. We note that the explanation provided by Annex A of other revisions does not explain why the protection that "*the manager has reasonable cause to believe*" has been removed from what is now paragraph (4)(b).
41. Whereas we welcome the commitment provided by Annex A and Annex B to expressly recognise legal privilege in this rule, the draft Rules still do not provide for this.
42. The rule should require that where the manager concludes that he or she "*has reasonable cause to believe that [the contents of correspondence] may endanger the security of the short-term holding facility or the safety of the detained person or other persons or are otherwise of a criminal nature*" his or her reasons are formally recorded in writing.
43. In paragraph (4)(b), the 'and' should be substituted for 'or' since, if either the addressee or sender is identifiable, there is no need for the correspondence to be opened as it can be either delivered or returned.

### **Rule 27 (Use of telephones)**

44. We note that in relation to the commitment to make express reference to mobile telephones, it is now said in Annex A that "*the legal advice is that it is unnecessary to do so*". We should welcome some more explicit explanation of why it is said to be unnecessary.

### **Chapter 7 (Health Care)**

45. We are concerned that there is no provision for medication to be retained or recovered by the detainee. If a person is detained at a reporting centre, for instance, and is on medication which they do not have with them, there should be a specific duty for that medication to be recovered where there is any risk that the person will be adversely affected by deprivation of it.
46. There should also be specific provision for a duty to secure the transfer of any medical records in respect of the person who is detained; and for these to be either provided to the person or transferred onwards after he or she leaves the STHF.

***Rule 31 (Notification of illness or death)***

47. We suggest that it would be in keeping with relatively recent developments in the law to expressly include reference to civil partners in paragraph (2)(a).

***Rule 35 (Temporary confinement)***

48. This rule should be improved by providing some definition of “*refractory*” and “*special accommodation*”.

Immigration Law Practitioners' Association

17<sup>th</sup> April 2009